



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 13, 1995

Mr. Mario Aguilar  
Senior Attorney  
Texas Department of Housing and  
Community Affairs  
P.O. Box 13941  
Austin, Texas 78711-3941

OR95-1405

Dear Mr. Aguilar:

On March 1, 1995, we received your request for an open records decision under the Open Records Act, chapter 552 of the Government Code, for certain records sought by Mr. Jaime L. Flores. Your request was assigned ID# 32091. You assert that the requested information is excepted from required public disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code.

The Open Records Act imposes a duty on governmental bodies seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten days after the governmental body's receipt of the request for information. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. See Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. *But see, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests).

We realize that the short time frame prescribed by section 552.301 may occasionally impose a substantial burden on governmental bodies seeking to comply with the act. Accordingly, when we receive an otherwise timely request for an open records decision that lacks some information necessary for us to make a determination, it has been our policy to give the governmental body an opportunity to complete the request.

On April 5, 1995, we asked you for a copy of the written request the department received from Mr. Flores, with the caveat that your failure to submit that request would result in the waiver of the act's discretionary exceptions. To date we have not received this information.

The Open Records Act places on the custodian of public records the burden of establishing that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). Your request for an open records decision remains incomplete. Without the information requested from you, this office is unable to make a decision as required by section 552.306 of the Government Code. See Open Records Decision No. 150 (1977). Consequently, we find that you have not met your burden under sections 552.301 through 552.303 of the Government Code and that the department has waived the protection of sections 552.103, 552.107, and 552.111.

As indicated above, however, the presumption of openness may be overcome by a showing that the information is made confidential by law. Open Records Decision No. 150 (1977). In this regard, we note that at least some portions of the sexual harassment files submitted to this office implicate the common-law privacy interests of certain department employees. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment were excluded from disclosure under the privacy doctrine as described in *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). However, the court ordered the release of the affidavit of the person under investigation. *Morales v. Ellen*, at 525. The *Ellen* court also ordered the disclosure of a pre-existing summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents. *Id.*

In this instance, however, it is not clear to this office whether or to what extent the department has released details of each of the alleged sexual harassment to the public. Consequently, we have no basis for concluding that the department has sufficiently informed the public of the details of these allegations. This office feels compelled to follow the *Ellen* decision with regard to victims' and witnesses' identities; we therefore have marked portions of Exhibits 1, 2, and 3 as representative of the types of information the department must withhold from those exhibits as well as from Exhibits 5, 6, 7, and 8<sup>1</sup> to protect the identities of the victims and witnesses, except to the extent that those types of information have been made public in court records. See *Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (no privacy interests compromised by release of information in public court records).

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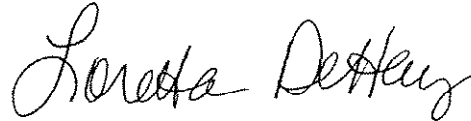
<sup>1</sup>Because it appears to this office that the documents contained in Exhibit 4 do not show that any sexual harassment took place and thus do not contain any "highly intimate or embarrassing" information, see *Industrial Foundation, supra*, this exhibit must be released in its entirety.

However, the court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity or the content of his statement and we decline to extend such protection to the alleged harassers here. We believe there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace. See, e.g., Open Records Decision Nos. 484 (1987), 400 (1983). Consequently, the department must release all remaining information pertaining to the investigations, including all references to the alleged harassers' name, because of the clear public interest in this information. Cf. Open Records Decision No. 444 (1986).

In summary, the department must withhold the types of information we have marked in Exhibits 1, 2, and 3 from all of the requested files (except for Exhibit 4, which must be released in its entirety) unless that information can be found in public court documents. The remaining information must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Records Division

LRD/RWP/rho

Ref.: ID# 32091

Enclosures: Marked documents

cc: Mr. Jaime L. Flores  
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(w/o enclosures)